IN THE

Supreme Court of the United States

No. 88

88

NATHAN D. LEIMAN and SAMUEL MARION,
Petitioners,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, ETC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS

LEO PRAEGER,
Attorney for Respondents,
401 Broadway,
New York 13, N. Y.

LEO PRAEGER,
BARNEY ROSENSTEIN,
On the Brief.

INDEX

Table of Cases Cited

Statutes Cited

Other Authorities Cited

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Opinions Below

The opinion of the Special Term of the Supreme Court of the State of New York is unofficially reported at 71 N. Y. Supp. 2d 200 (R. 25-26).

The decision of the Appellate Division of the Supreme Court of the State of New York is reported in 272 App. Div. 896 (R. 29).

The decision of the Appellate Division of the Supreme Court of the State of New York permitting an appeal to the Court of Appeals of the State of New York is reported at 272 App. Div. 962 (R. 28-29).

The opinion and decision of the Court of Appeals of the State of New York is reported in 297 N. Y. 201 (R. 31-38).

The order of the Court of Appeals of the State of New York denying plaintiff's motion for reargument is reported in 297 N. Y. 201. It does not appear in the record.

The opinion of Gibson, D. J., reported in 69 Fed. Supp. 656 under title "In Re Pittsburgh Terminal Coal Corporation" (p. 1, brief for petitioners) forms no part of the opinions below.

Question Presented

The only question presented to the Court of Appeals of the State of New York was one certified to that court by the Appellate Division of the Supreme Court of the State of New York, to wit, "Has the Supreme Court of the State of New York jurisdiction over the subject matter of this action to recover for legal services rendered to the stockholders' committee which are not compensable out of the assets of the debtor's estate in a Chapter X reorganization proceeding under the United States Bankruptcy Act" (R. 29). The petitioner's brief (pp. 2-3) under the heading "Question Presented" sets forth a series of questions which were not presented to nor considered by the New York State Court of Appeals. It should be noted that the question of law determined by the New York State Court of Appeals did not contain any of the factual material which petitioner now assumes.

Statement of the Case

The action was instituted by the service of a summons and complaint in the New York State Supreme Court. Thereafter the complaint was amended (R. 8-14). The amended complaint alleges a hiring of petitioners by re-

spondents to represent them in a reorganization proceeding under Chapter 10 of the Bankruptcy Act, a deposit by respondents of 584 shares of stock of the Pittsburgh Terminal Coal Corporation to provide for additional compensation to the petitioners for their services in connection with the reorganization proceeding, an allegation of substantial performance, and a failure by respondents to turn over the said stock to the petitioners. The prayer sought mandatory relief ordering respondents to turn over to petitioners herein the shares of stock in question.

Pursuant to the contract of hiring, petitioners rendered professional services in the reorganization proceeding then and now pending in the Federal District Court for the Western District of Pennsylvania. During the course of the proceedings, application was made by the petitioners to the Reorganization Court for an allowance of $125,000 upon a full and detailed recital of all services rendered in the reorganization proceeding, including those services now characterized by petitioners as non-compensable and which allegedly are the bases for the action instituted by them in the New York State Court.

Petitioners, in their application, recited all services rendered by them in the reorganization proceeding and made no separation of compensable from noncompensable services, and did not assert that any of the services so rendered were not compensable out of the bankrupt estate. The Reorganization Court granted an allowance of $37,500 instead of $125,000 sought by petitioners for their services in the reorganization proceeding. Petitioners, feeling aggrieved, thereupon sought a modification of that order in that it be made without prejudice to the claim for "additional compensation". The District Court refused to pass upon the claim for additional compensation declining "present jurisdiction". (R. 17). Thereupon, peti-

tioners instituted this action in the New York State Supreme Court for a mandatory injunction to compel respondents to turn over the shares of stock referred to in the agreement (R. 10) to the petitioners. The complaint in the action below is bare of any allegation that petitioners (plaintiffs below) sought a recovery for noncompensable services performed by them, nor is any claim made that the services rendered, requiring the delivery of the shares of stock in question, were of a nature not compensable out of the bankrupt estate.

The Legal Issues

(1) The New York State Court of Appeals properly confined itself to a consideration of the question certified to it. The questions raised by the petitioner (brief of petitioners, pp. 2-3) were not before that court upon appeal.

(2) Respondents herein (defendants in the court of first instance), in lieu of answering the amended complaint (R. 8-11) moved pursuant to Rule 107, subdivision 2, of the Rules of Civil Practice of the State of New York, to dismiss the amended complaint on the ground that the court did not have jurisdiction of the subject matter of the action (R. 3). That application was grounded on the position that the amended complaint sought compensation for services alleged to have been rendered by the petitioners in connection with a Chapter X reorganization proceeding, and that jurisdiction over such claims could not be asserted in a State Court since the Bankruptcy Act had delegated jurisdiction to the Reorganization Court pursuant to the provisions of Chapter X of the Bankruptcy Act. Respondents' motion to dismiss the amended complaint was denied by the Supreme Court of the State of New York (R. pp. 2, 25).

An appeal to the Appellate Division of the Supreme Court of the State of New York was thereafter taken by respondents. The order of the Supreme Court of the State of New York was affirmed by a divided Court (R. 29). Leave was granted by the Appellate Division of the Supreme Court of the State of New York to appeal to the Court of Appeals of the State of New York (R. 28-29), and a question was certified to the Court of Appeals of the State of New York by the Appellate Division of the Supreme Court of the State of New York (R. 29). Petitioners contend that the question as certified to the Court of Appeals was too narrow and did not properly state what they now perceive to be the issues involved (Petitioners' brief, pp. 2-3).

It is hardly appropriate for the petitioners to complain about the narrowness of the question as it was the question framed by them which was adopted by the Appellate Division of the New York State Supreme Court and so certified to the Court of Appeals of the State of New York. The Court of Appeals of the State of New York reversed the courts below, answered the question certified to it in the negative, and granted respondents' motion to dismiss the amended complaint for want of jurisdiction (R. 37-38).

I.

The New York State Court of Appeals after due consideration of the applicable statutes and controlling authorities properly decided the question of its own jurisdiction.

(a) A test of the New York State Courts' jurisdiction of the subject matter was the sole issue raised below.

The motion addressed to the complaint confined itself to the legal assertion that the New York State Courts

lacked jurisdiction of the subject matter of the action. It was this contention, urged by respondents, that was considered in the courts below. The New York State Court of Appeals had before it the narrow question of the lack of jurisdiction in state courts to consider an application for fees of a non-compensable nature arising out of a reorganization proceeding under Chapter X of the United States Bankruptcy Act. Quite properly, that court could only decide the question certified to it and no other.

The Civil Practice Act of the State of New York (Sec. 588(4)) provides for certification of a legal question by the Appellate Division of the Supreme Court of the State of New York to the Court of Appeals of the State of New York. The rule is well settled that the sole power of the Court of Appeals in such a case is confined to consideration of the question certified to that court.[1]

The Court of Appeals of the State of New York, in light of its statutory limitations, merely considered the ques-

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[1] *Central Trust Company of New York* v. *Pittsburgh S. & N. R. Co., et al.*, 229 N. Y. 68, 128 N. E. 114 (May 7, 1920), Cardozo, J.:

> "The appeal brought up for review the question certified and no other." (p. 70)

Zenith Bathing Pavilion v. *Fair Oaks S.S. Corp.*, 240 N. Y. 309, 148 N. E. 532 (June 2, 1925), wherein Judge Cardozo, speaking for the court, stated the rule as follows:

> "Upon this appeal, our power of review is limited to the question certified. * * *." (p. 313).

Schieffelin v. *Hylan, et al.*, 229 N. Y. 633, 129 N. E. 937 (October 22, 1920):

> "The order of which review is sought is an intermediate one and this court only acquires jurisdiction by virtue of permission to appeal granted by the Appellate Division on questions certified to us for answer." (p. 634)

Harvard Law Review, Volume LXI, No. 8, September, 1948, page 1449.

tion certified to it by the Appellate Division of the Supreme Court of the State of New York and none other. Its decision received favorable comment in a note in *Harvard Law Review*, Vol. LXI, No. 8, September, 1948, page 1450.

(b) The Constitution of the United States, pertinent statutes and legislative history decisively indicate the correctness of the decision of the New York State Court of Appeals.

The Constitution of the United States vests in the Congress of the United States the power to legislate on the subject of bankruptcy throughout the United States.[2]

Congress exercised that power delegated to it by the Constitution through the enactment of the provisions of the Judicial Code and Judiciary, Section 256 (28 U. S. C. 371):

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states:
>
> * * * * * * * *
>
> Sixth: Of all matters and proceedings in bankruptcy."

Section 221(4) of the Federal Bankruptcy Act (11 U. S. C. 621(4)):

> "The judge shall confirm a plan if satisfied that"
>
> * * *

[2] Article I, section 8, of the Constitution of the United States provides:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises * * * to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy throughout the United States."

"(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in or in connection with, the proceedings or in connection with the plan and incident to the reorganization, have been fully disclosed to the Judge and are reasonable, or if to be fixed after confirmation of the plan, will be subject to the approval of the Judge."

It is apparent that this section does not limit the Bankruptcy Court's powers over fees merely to such as are to be charged to the debtor's estate. It expressly requires disclosure to the Bankruptcy Court of all payments made or promised "either by the debtor" or "by any other person" for services rendered in connection with or incident to the reorganization of the plan and further provides for court approval of such payments only if the amount agreed upon is "reasonable". Clearly, such explicit and broad language is applicable to the fee agreement which is the subject matter of this action brought in the state court.

Section 221(4) was included in Chapter X to provide for broader judicial supervision than that contained in Section 77B of the Bankruptcy Act (11 U. S. C. §207), the predecessor statute to Chapter X. Subsection (f)(5) of Section 77B (11 U. S. C. §207(f)(5)) provided that "the judge shall confirm the plan if satisfied that * * *

"(5) all amounts to be paid by the debtor or by any corporation or corporations acquiring the debtor's assets, and all amounts to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation for services or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject to the approval of the judge;"

This section provided for judicial scrutiny and approval of fees for services in the reorganization rendered only by "committees or reorganization managers", "whether or not" payable "by the debtor or any corporation or corporations acquiring the debtor's assets." Section 221(4) of Chapter X, on the other hand, is far more comprehensive. It includes fees not only of committees and reorganization managers but of all persons serving in the reorganization in a representative capacity and the bankruptcy court's control applies, as we have seen, both where such fees are paid by the debtor, a successor corporation or by any other person. It is apparent from this analysis that the all-inclusive provisions of Section 221(4) were intended to reach private fee arrangements between security holders and the attorneys retained to represent them in the reorganization under Chapter X.

The correctness of the construction advanced here of Section 221(4) is corroborated by the legislative history of that section.[3]

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[3] The report on Chapter X by the Senate Committee on the Judiciary, U. S. Senate Report #1916, 75th Congress, 3rd Session (1938), page 36, states:

> "Subsection (4) of Section 221, derived from Section 77B (f) (5), requires full disclosures and the approval by the judge of all payments for services, and for costs and expenses, in connection with the plan or the proceedings, whether such payments are made or promised by the debtor, or by any corporation succeeding it, or by any other person."

The Commission to Congress in its "Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees", referring to the jurisdiction conferred upon the bankruptcy court under Section 77B and Chapter X, states in Part VIII (1940), pages 253-4:

> "The supervisory power of the court (under Section 77B) over the amount of the fees received by parties to a reorganization was broader than the court's affirmative power to grant allowances out of the estate to these parties. Thus, any allowance of compensation or reimbursement for expenses, when paid by the debtor or by any new corporation acquiring its

Collier, in his work on bankruptcy (p. 3891, et seq., 14th ed. 1971), commenting on the broader scope of 221(4) as contrasted with its predecessor section, states:

> "The provision remedies a defect of former 77B in that the requirements for disclosure and approval apply to every payment or promise, whether or not made to committees or reorganization managers, and cover payments or promises made not only by the debtor or successor corporation but also by 'any other person' which includes protective committees, attorneys, agents or representatives, as well as the trustee and other officers of the estate.

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assets, was subject to final determination by the court. In addition, it was provided that 'all amounts to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation' must receive the approval of the court as a condition of confirmation of the plan.

"There is little argument against, and much good reason for, subjecting all compensation and expenses, from whomsoever received, to the scrutiny and necessity of approval by the court. The provision last quoted above had the merit of supplying judicial scrutiny in the event, for example, of an attempt to compensate reorganization managers or protective committees by the device of a separate charge upon creditors or stockholders who assented to the plan of reorganization. But it lacked inclusiveness, since in terms it applied only to the fees and expenses of managers and committees. To a limited extent, i.e., as to committee attorneys not paid out of the general estate, the courts were able to overcome this difficulty through use of the so-called 'scrutiny' clause of Section 77B. Thus, where a creditors' committee, in behalf of those whom it represented, contracted to pay its attorney 10 percent of any dividends or proceeds of payment paid to creditors represented by the committee, it was held that this exercise of the committee's powers, and hence the attorney's remuneration, was subject to review and modification by the court, through the express power in the statute to scrutinize and disregard committee 'authorizations'. Preferably, however, the court's power over compensation and expenses of any persons concerned in the proceedings should be a plenary power to review their reasonableness from whatever source paid, and such power has now been granted to the courts by the provisions of Chapter X (Section 221(4))."

"Under 221(4) the bankruptcy court has plenary power to review all fees and expenses in connection with the reorganization, from whatever source they may be payable. It can hardly be denied that subjecting all compensation and expenses from whomsoever received to court scrutiny is desirable."

Control over all fees by the Bankruptcy Court is an indisputable part of the over-all judicial scrutiny of the reorganization process which the reorganization judge is required to exercise. Such power to scrutinize fee agreements and arrangements is explicitly recognized in Section 212 of Chapter X (11 U. S. C. 612), sometimes referred to as "the scrutiny clause", which provides:

"The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation of or in the course of the proceeding under this chapter to the actual consideration paid therefor."

This provision, it is evident, gives the bankruptcy court extensive powers over those serving in a reorganization in a representative capacity, and over all agreements and authorizations incident to such representation.

Section 242 (11 U. S. C. 642) permits reasonable compensation for services rendered:

(1) "In connection with the administration of an estate * * * or

(2) "In connection with the plan approved by the judge."

Section 243 (11 U. S. C. 643) provides as follows:

> "The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

The language of Section 221(4) (11 U. S. C. 621(4)) is considerably broader than that set forth in Section 242 (11 U. S. C. 642) and Section 243 (11 U. S. C. 643) dealing with compensation out of the assets of the estate. In thus subjecting to judicial scrutiny all payments made or promised, it is clearly the intention of this section of the statute to provide that all payments in the reorganization proceedings must be made with the approval of the court. Thus it is the responsibility of the reorganization court to supervise the reasonableness of payments for services even when not made out of the estate.

The desire and intent of Congress to delegate to the federal court exclusive jurisdiction of all federal matters is further demonstrated by Section 258 (11 U. S. C. 658), which provides that the federal court shall fix fees for services rendered in prior proceedings whether state or

federal. That Congress intended that all fees, allowances and expenses in connection with Chapter X reorganization proceedings are subject to the approval of the Reorganization Court is further borne out by Section 216(3) (11 U. S. C. 616(3)) which provides:

> "A plan of reorganization under this Chapter . . . (3) shall provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge."

(c) Claims for fees for services rendered in a Chapter 10 reorganization proceeding, even though not payable out of debtor's estate, may not be asserted in any forum other than the reorganization court.

The decision of the New York State Court of Appeals is in accord with the provisions of Chapter 10 of the Bankruptcy Act and prior decisions of this court.

In *Brown v. Gerdes*, 321 U. S. 178 (1944), Mr. Justice Douglas speaking for this court enunciated the following principle:

> "And Chapter X of the Chandler Act which took the place of §77B set up even more comprehensive supervision over compensation and allowances (H. Reps. No. 1409, 75th Cong., 1st Sess., pp. 45, 46) and provided a centralized control over all administration expenses.
>
> "Thus chapter X not only contains detailed machinery governing all claims for allowances from the estate. It also requires the plan to contain provisions for the payment of all allowances and places on the judge the duty to pass on their reasonableness. The approval of the plan of reorganization has been entrusted to the bankruptcy court exclusively. Even reports on plans submitted by the Securities and Exchange Commission are advisory

only.' §172, 11 U.S.C.A. §572, 3 F.C.A. title 11, §572. It could hardly be contended that the bankruptcy court might dispense with the finding required by §221(2) that the plan is 'fair and equitable, and feasible' and confirm the plan on another basis of delegate the task to another court or agency. See Case v. Los Angeles Lumber Product Co., 308 U. S. 106, 114, 115, 84 L. ed. 110, 119, 120, 60 S. Ct. 1, 41 Am. Bankr. Rep. (NS) 110; Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510, 85 L. ed. 982, 61 S. Ct. 675, 45 Am. Bankr. Rep. (NS) 79. But if that cannot be done, it is difficult to see how a plan could be confirmed which left the approval of certain allowances to a state court. The finding as to allowances required by §221(4) is as explicit and as mandatory as the finding of 'fair and equitable, and feasible' required by §221(2). On each Congress has asked for the informed judgment of the bankruptcy court, not another court or agency. * * *"

"Whatever doubts may have once existed as to the functions of a reorganization court, it is clear under this recent bankruptcy legislation that the approval of all fees as part of the plan has been entrusted to the bankruptcy court exclusively."

Respondents have consistently taken the position that they are responsible for non-compensable services if such were rendered by petitioners, but that the only forum which may consider the question is the Reorganization Court.

In the language of Justice Douglas, *Brown v. Gerdes*, cited *supra* (p. 188):

"We only hold that the Bankruptcy Court has exclusive authority under Chapter X to fix the allowances for fees."

In the concurring opinion of Mr. Justice Frankfurter in *Brown v. Gerdes*, cited *supra*, it is pointed out

> "That where a right arises out of the law of the United States, Congress may, if it sees fit, give to the Federal courts exclusive jurisdiction." (p. 189)

In re McCrory Stores Corp., 19 F. Supp. 947 (S.D.N.Y., 1936), aff'd 91 F. (2d) 947 (C.C.A. 2nd Cir., 1937), cert. 302 U. S. 725, which was decided under the provisions of Section 77B, the reorganization court reduced a fee payable to an attorney from a committee of creditors even though the attorney had a written contract with the committee for a fee far greater than that allowed by the court.

On appeal, the Circuit Court for the 2nd Circuit, affirmed the right of the reorganization judge to reduce fees payable by a creditors' committee pursuant to written agreement to an amount commensurate with the value of the services rendered, even though they be of a non-compensable nature.

The rule was stated as follows:

> "Judge Patterson who made the order held that under sub-division (b)(10) of section 77B 'the duty is laid on the court to see to it that the amount to be received by counsel is no more than commensurate to the services rendered'. Had the reorganization been less successful, he might well have thought the full 10% could fairly be paid, but believing as he did that the agreement was not binding on the court, if the compensation under it would result in more than a quantum meruit, he reduced it accordingly * * *." (91 F. (2nd) 948)
>
> "When Mr. Cooper continued to perform services in the reorganization proceeding he necessarily acted pursuant to the power of the judge to terminate his contract." (91 F. (2nd) 950)

It is noteworthy that in the case of *In re Philadelphia & Reading Coal & Iron Company*, 61 Fed. Supp. 120 (E.D. Pa., 1945), likewise considered under Section 77B, the reorganization court not only fixed the amount of compensable services, but when called upon made an allowance for non-compensable services to the attorneys involved. Thus, in passing upon the application of the Philadelphia Bondholders' Committee and counsel the court separated the compensable from the non-compensable services and made an allowance for both.

Kirkpatrick, Justice (p. 127):

> "As pointed out in connection with the request of the indenture trustee, this portion of the services, though in the duties of both committee and counsel under their employment and undoubtedly a proper charge against the bondholders, is not compensable by the estate. I fix the reasonable value of such proportion of the services at $7,500 and an allowance from the estate will be made in the amount of $92,500."

The New York State Court of Appeals properly found that a statutory duty had been imposed upon the reorganization court to examine and approve all fees and allowances to the extent that they are reasonable, regardless of the source from which they might be payable, that power is vested in the reorganization court and its judicial responsibility can not be delegated to another tribunal. Any other conclusion would frustrate the purposes of the Act and leave security holders exposed to the risk of having their participation reduced through excessive fees—whether by private arrangement or otherwise. The control of fees and allowances exercised by the reorganization court is indispensable to the orderly process

of reorganization and cannot be dispensed with or discharged in any other forum.

It is significant to note that this Court has sustained the plenary power of the Bankruptcy Court to control in a Chapter X reorganization proceeding all fees whenever and in whatever form the question arose.

Woods v. City National Bank & Trust Co., 312 U. S. 262, 267 (1940).

II

The authorities relied upon by petitioners have no applicability to a reorganization proceeding arising under Chapter 10, Bankruptcy Act.

The petitioners rely upon *In re P. B. Holding Corp.*, 147 F. (2nd) 895 (C.C.A. 2nd C., 1945) (petitioners' brief, p. 15), and attempt to show that the payment of counsel fees for non-compensable services is analogous to brokerage commissions paid to a firm of stockbrokers, in connection with the purchase of securities. The court noted the distinction between payments for brokerage commissions and those for fees and allowances for services rendered in a reorganization proceeding:

> "The appellant asserts that Bisgeier & Cohen should have reported the fees paid to Newburger Loeb & Company for acting as broker in the purchase of these certificates. It is true that section 221, subdivision 4, 11 U.S.C.A. section 621, subdivision 4, requires that all compensation for services rendered in the reorganization proceeding or in connection with the plan be submitted to judicial scrutiny. This section aimed to eliminate the practice of fixing reorganization fees and expenses by private arrangement thereby decreasing the effective amount of recovery for the creditors." (p. 899)

The court then concluded that Section 221(4) (11 U.S.C. 621(4)) is not applicable to commissions paid to a broker.

In the light of the 2nd Circuit Court's determination in the *McCrory Stores* case (*supra*) there is nothing in Judge Frank's opinion in the *L. B. Holding Corp.* case the principle that had there been presented to the Court a private fee arrangement, it would have been scrutinized and passed upon.

The petitioners endeavor to find comfort for their contention in the following decisions rendered by the various Circuit and District Courts:

Zweifel v. Trans-State Oil Company, 99 F. (2d) 650 (C.C.A. 5th Cir. 1938);

In re Mt. Forest Fur Farms of America, 157 F. (2d) 640 (C.C.A. 6th C., 1946);

Greensfelder, et al. v. St. Louis Public Service Co., et al., 114 F. (2d) 53 (C.C.A. 8th Cir., 1940);

Standard Gas & Electric Company, 106 F. (2d) 215 (C.C.A. 3rd C., 1939);

In re Watco Corp., 95 F. (2d) 249 (C.C.A. 7th C., 1938);

In re Middlewest Utilities Co., 17 Fed. Supp. 359 (N. D. Ill., 1936).

None of the above cited cases relied upon by petitioners to support their contention that the courts have frequently declined to pass upon private fee arrangements between attorneys and stockholders' committees, were considered under Chapter X of the Bankruptcy Act (Section 221(4)). These cases were proceedings under Section 77(B) which, as this court has noted in *Brown v. Gerdes* (*supra*), is far less comprehensive than the present Chapter X. The question of the power and duty of the

court to scrutinize private fee arrangements involving non-compensable services even in a 77(B) case were not directly presented to the court in the cited cases. When the court was confronted with such an issue, it was not at all reluctant to scrutinize the private fee arrangement even under Section 77(B) and set it aside.[1]

In the *Zuccifel* case cited by petitioners (brief, p. 16), the Circuit Court of Appeals for the 5th Circuit only had before it the question of compensation payable out of the debtor estate. The court was not called upon to pass upon the question of additional compensation promised by the debtor in reorganization. In that case, the District Court had found that since the applicants were to receive a further fee from the reorganized debtor, that no allowance would be made from the estate. The one and only question on appeal to the Circuit Court was that of an allowance from the estate of the debtor.

Judge Holmes, speaking for the 5th Circuit, disposed of that question in the following language:

> "The court below neither approved or disapproved the agreement for additional compensation, but assumed that it was binding on the debtor. We also withhold approval or disapproval as beyond our jurisdiction on this appeal."

In the *Mt. Forest Fur Farms of America* case (*supra*), the court, in considering the claim of two attorneys for fees from the estate, merely held that such services were not of any assistance in the reorganization and could not be charged against the debtor estate. The court was neither requested nor called upon to make an allowance of a non-compensable nature.

[1] *In Re McCrory Stores Corp.*, 19 Fed. Supp. 917, aff'd 91 F. (2d) 947, cert. den. 302 U. S. 725.

In the *Greensfelder* case (*supra*), the Circuit Court, 8th Circuit, merely had the question of allowances for services rendered by attorneys before it. It did not decide or pass upon any application with reference to services of a non-compensable nature. Petitioners misconstrue the court's language in the *Greensfelder* case when the court stated that the obligation for payment of non-compensable services rests upon Mr. Greensfelder's client. The respondents herein do not dispute the personal obligation to pay for non-compensable services rendered in connection with a reorganization proceeding. The sole issue in this case is the appropriate forum where such a claim may be asserted. The respondents have urged that the exclusive forum for the ascertainment of the value of such non-compensable services is the Reorganization Court and none other.

Petitioners further seek to support their contention by reference to the cases of *London* v. *Snyder*, 163 F. (2d) 621 and *Cooke* v. *Bowersack*, 122 F. (2) 977, both of which were proceedings arising under Chapter X of the Bankruptcy Act. An examination of these cases merely reveals that the only question involved therein was the amount of allowances paid to counsel out of the debtor's estate, and the power of the Circuit Court to review the determination of the District Court on that question.

Petitioners urge that the language in the last paragraph of the opinion in *Cooke* v. *Bowersack* (cited *supra*), supports their contention. Certainly, nothing is contained therein that can be construed as a finding that the reorganization court did not have jurisdiction over the question of services which were not compensable out of the estate, as that issue was not presented to the court.

III

In matters involving Chapter X Reorganization Proceedings, the Federal Court may not delegate its authority over fees and allowances to any other court or agency.

The petitioners urge that the Federal Court by its decision consented to the adjudication of their claims in the State Court (petitioners' brief, p. 20). As legal authority for this contention, they rely upon *In Re Brown (Gerdes)*, 290 N. Y. 468 (April, 1943), and quote from the opinion in that case. A careful examination of the opinion in the cited case fails to disclose the quoted language. On the other hand, Judge Finch, writing for the New York State Court of Appeals, held:

> "Any attempted surrender of jurisdiction by the United States Court, even if that were possible, would have to be implied. This court has ruled that there may be no implied surrender of the jurisdiction of the Federal court over a matter arising in the course of a bankruptcy proceeding. Palmer *v.* Larchmont Manor Co., 284 N. Y. 288, 30 N. E. 2d 599." (p. 474)

Petitioners also employ some language from Mr. Justice Frankfurter's concurring opinion in *Brown v. Gerdes* (*supra*), in an attempt to support their contention on this point (Petitioners' brief, p. 20).

A complete examination of Mr. Justice Frankfurter's opinion indicates that he concurred with the opinion of the court that the District Court could not delegate its responsibility and duty with respect to fees and allow-

ances in a Chapter 10 reorganization proceeding. Mr. Justice Frankfurter used the following language (p. 188):

> "Since 1789, rights derived from Federal law could be enforced in State courts unless Congress confined their enforcement to the Federal courts."

And at page 189

> "The upshot of the matter is that 'rights, whether legal or equitable, acquired under laws of the United States, may be prosecuted in the United States Courts or in the State courts competent to decide rights of the like character and class, subject, however, to this qualification: that where a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal courts exclusive jurisdiction'. Claflin v. Houseman, 93 U. S. 130, 136, 137, 23 L. Ed. 833, 838."

Mr. Justice Douglas, in delivering the opinion of the court, noted the exclusive jurisdictional features of Section 221(4) of the Bankruptcy Act (p. 183).

Exclusive jurisdiction features in a Federal statute have repeatedly been upheld by this court.[5]

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[5] *Yakus* v. *U. S.*, 321 U. S. 414 (March 1944); *Bowles* v. *Willingham*, 321 U. S. 503 (March 1944).

IV

CONCLUSION

The judgment below should be sustained.

The beneficial purposes and public policy underlying the enactment of Section 221(4) of the Bankruptcy Act, and the safeguarding of the interests of security holders, can only effectively be accomplished by requiring the Bankruptcy Court to scrutinize all fee arrangements and determine the reasonableness of such arrangements and fix the quantum of all such fees. Any other result would frustrate and defeat the salutary purpose sought to be accomplished by the enactment of Chapter X.

Respectfully submitted,

LEO PRAEGER,
Attorney for Respondents.

LEO PRAEGER,
BARNEY ROSENSTEIN,
On the Brief.